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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-88

ROBERT R. PHILLIPS, Individually and on Behalf of Each and All Others Similarly Situated, *et al.*, *Petitioners*,

v.

E. T. KLASSEN, Individually and in His Official Capacity as Postmaster General of the United States Postal Service, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Civil Service Commission exceeded its statutory authority in promulgating the disputed regulation relating to reductions in force and erred in its review of the implementation of the regulation by the Post Office Department	8
II. The decision below conflicts with decisions of other Courts of Appeals on the issue of whether exhaustion of administrative remedies is necessary where such exhaustion would be fruitless	11
III. The class action should have been certified pursuant to the usual interpretation of Rule 23 of the Federal Rules of Civil Procedure	13
Conclusion	15
Appendix	
Opinion of Court of Appeals	.1a
Order of District Court	15a
Decision of Civil Service Commission	16a
Statutory Provisions Involved	20a

AUTHORITIES CITED

Cases: Page

Barela v. *United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972) 7, 12

Dierks v. *Thompson*, 414 F.2d 453 (1st Cir. 1969) 14

Esplin v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) 14

Harris v. *Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964) 14

Oatis v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968) 7, 12

Stanley v. *Illinois*, 405 U.S. 645 (1972) 13

Statutes and Regulations:

5 U.S.C. § 8336 ..... 3, 4, 6, 7, 8, 21a, 22a

28 U.S.C. § 1254(1) 2

28 U.S.C. Federal Rules of Civil Procedure, Rule 23 3, 7, 13, 14, 20a

5 C.F.R., ch. 1, pt. 351 ..... 3, 9, 23a

Federal Personnel Manual Supplement 831-1, Subchapter S11-d(2) 3, 4, 5, 6, 8, 9, 11, 22a

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E. T. KLASSEN, Individually and in His Official Capacity as Postmaster General of the United States Postal Service, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert R. Phillips, Mary A. Karwoski, Ira S. Greinsky, Ann Putney Flory and Birger F. Burman, individually and on behalf of each and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District

of Columbia Circuit entered in this proceeding on May 10, 1974.[1]

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as does the District Court order appealed from. No opinion was rendered by the District Court for the District of Columbia. The decision of the United States Civil Service Commission Board of Appeals and Review In the Matter of Ira S. Greinsky, one of Petitioners, also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered May 10, 1974. This petition for a writ of certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Service Commission was authorized by law to promulgate the regulation under which named Petitioners and others similarly situated retired from the U.S. Post Office Department between May 16 and June 15, 1971, and whether required procedures were followed in implementing the regulation.

2. Whether exhaustion of administrative remedies by persons seeking judicial review is required where the issues sought to be reviewed have already been

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[1] Respondents in this proceeding, appellees below, are E. T. Klassen, Robert E. Hampton, Jayne B. Spain, and L. J. Andolsek, individually and in their official capacities, and the United States Postal Service. Robert E. Hampton is Chairman of the United States Civil Service Commission, and Jayne B. Spain and L. J. Andolsek are the other two Commissioners.

finally adjudicated by the administrative body and further administrative appeals would be fruitless.

3. Whether a suit brought on behalf of over 1500 former U.S. Post Office Department employees alleging invalidity and coerciveness of the regulations and procedures under which their retirements were effected may be certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C., Federal Rules of Civil Procedure, Rule 23; 5 U.S.C. § 8336 (1970) and § 8336 (d) (as amended, 1973); Federal Personnel Manual Supplement 831-1, Subchapter S11-d (2) (1970); 5 C.F.R., ch. 1, pt. 351 (1973). Pertinent parts of texts of statutory provisions are reproduced in Appendix.

STATEMENT OF THE CASE

This case arose from personnel actions incident to the 1971 reorganization of the United States Post Office Department into an independent executive agency, the United States Postal Service. The jurisdiction of the district court was invoked following the exhaustion of administrative remedies by petitioner Greinsky and pursuant to the court's statutory authority to afford equitable relief and render monetary judgments in cases involving laws and regulations governing federal employment.

Headquarters and regional employees were first informed of certain of the details of the proposed reorganization in a memorandum from the Postmaster General dated May 12, 1971. In that memorandum, it was stated that the number of postal regions would be decreased, authority and management responsibility would be decentralized, and headquarters and regional

staff complements would be reduced. The message also announced the "liberalization" of retirement policies, and a one-time bonus offer designed to induce older postal employees to retire. The following day, the Postmaster General further elucidated the retirement announcement in a national teleconference and a supplementary memorandum, to which was appended a resignation form.

The retirement inducement offered those who retired between May 16 and June 15, 1971, a bonus equal to six months' salary in addition to the 4.5 percent cost-of-living increase previously authorized by the Civil Service Commission for all federal employees retiring prior to May 31. In addition, resignations were to be treated as "involuntary separations" for purposes of liberalizing age and service requirements for annuity eligibility. Ordinarily, in order to qualify for an annuity, a federal employee must be 55 years of age with 30 years of service, 60 years of age with 20 years of service, or 62 years of age with 5 years of service. 5 U.S.C. § 8336 (Appendix 21a). However, reduced annuities were available under 5 U.S.C. § 8336 (d) in cases of "involuntary" separation, except for cause, of employees who are 50 years of age with 20 years of service or who have completed 25 years of service. The informal application of this section to "voluntary" resignations submitted in anticipation of a reduction in force was formally approved by the Civil Service Commission in 1969, in Federal Personnel Manual Letter No. 831-23, subsequently codified as FPM Supplement 831-1, Subchapter S11-d (2) (Appendix 22a).

The implied threat to employees was that, unless they accepted the retirement offer, they would be subject to dismissal through a reduction in force in which standard civil service procedures would be followed. Thus,

"eligible" employees were granted, in effect, 18 days in which to resign if they were to receive the bonus, the cost-of-living increase, and the annuity. Although FPM Letter No. 831-23 required that each person requested to resign in contemplation of a reduction in force must be fully informed of his retention rights, eligible employees were not informed of these rights. Nor were they given access to retention registers during the period in which they had to decide whether to accede to the inducements to retire or risk separation later without the liberalized benefits.

The Postmaster General's carrot and stick approach was successful. By June 15, 1971, 1,884 of the 2,740 employees eligible for the bonus and annuity, including the five named Petitioners herein, had retired.

Petitioner Greinsky retired from the United States Post Office Department on May 31, 1971. On June 9, 1971, he wrote the New York Regional Office of the Civil Service Commission, complaining that he had never been informed of his retention rights by the Department and that his resignation was involuntary and coerced. His complaint was rejected by a Civil Service Appeals Examiner June 29, 1971. He appealed this ruling to the Civil Service Commission Board of Appeals and Review, which on October 18, 1971, issued a decision upholding the finding of the Appeals Examiner (Appendix 16a).

Thereafter, on June 14, 1972, suit was filed in the United States District Court for the District of Columbia by the five Petitioners herein, each representing a different age and service classification, on behalf of themselves and all others similarly situated. The suit charged that they had been unlawfully removed from

their positions because the Civil Service Commission was without authority to promulgate Subchapter S11-d (2); that even if the regulation were valid, the Postal Service failed to comply with its requirements; and that their retirements were coerced as a matter of law. A motion for certification of class action was also filed. Respondents, defendants in District Court, filed a motion for summary judgment with regard to Greinsky and a motion to dismiss with regard to the other named plaintiffs and opposed certification of the class action. Petitioners filed a cross-motion for summary judgment. On October 6, 1972, the District Court granted respondents' motions in an order denying certification of the class action, granting summary judgment with regard to Greinsky and dismissing the action with regard to the other named plaintiffs (Appendix 15a).

A timely appeal followed to the Court of Appeals for the District of Columbia Circuit, which on May 10, 1974, affirmed the District Court's order (Appendix 1a). The decision of the Court of Appeals reiterated the chronology leading up to the appeal, implicitly confirming the legality of the retirement procedure. The denial of class action certification was upheld on the basis that the named plaintiffs were not truly representative of the interests of the defined class. Summary judgment as to Greinsky was affirmed because the court found the record to be supportive of the Civil Service Commission's disposition of the case. The dismissal of the action as to the other named plaintiffs was upheld because of failure to exhaust administrative remedies and the impracticability of the remedy sought.

In the interim, the regulation authorizing application of 5 U.S.C. § 8336 (d) to requested resignations in an-

ticipation of a reduction in force was rescinded, effective January 1, 1973. Subsequently, on June 12, 1973, the President signed into law Public Law 93-39, amending § 8336 (d) specifically to allow reduced annuities to be paid to those in the 50 years of age/20 years of service and 25 years of service categories in certain reduction-in-force situations. Thus statutory authority was provided for the kind of procedure utilized in the Post Office Department's retirement offer originally made two years earlier.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the instant cause:

1. Presents squarely the issue of the proper interpretation of the statutory powers of the Civil Service Commission and federal agencies in cases involving federal reduction in force, which issue is of such importance to the fulfillment by such agencies of their duty to protect the federal civil service system as to merit review and resolution by this Court;

2. Is in conflict in principle with the decision of the Court of Appeals for the Tenth Circuit in *Barela* v. *United Nuclear Corp.*, 462 F.2d 149 (1972) and the Court of Appeals for the Fifth Circuit in *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (1968);

3. Erroneously interprets Rule 23 of the Federal Rules of Civil Procedure governing class actions to permit a District Court to refuse to certify an action as a class action if there is the potential that there will be divergent views among the class and the possibility that the devising of an appropriate remedy will be complex; and

4. Denies Petitioners due process of law.

I. THE CIVIL SERVICE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN PROMULGATING THE DISPUTED REGULATION RELATING TO REDUCTIONS IN FORCE AND ERRED IN ITS REVIEW OF THE IMPLEMENTATION OF THE REGULATION BY THE POST OFFICE DEPARTMENT.

The regulation authorizing the retirement proposal made by the Post Office Department was for three years codified as Federal Personnel Manual Supplement 831-1, Subchapter S11-d (2). The subchapter—which was without statutory sanction—purported to allow "voluntary" resignations submitted upon request in contemplation of a reduction in force to be considered "involuntary" within the meaning of 5 U.S.C. § 8336 (d), which provides reduced annuities to those involuntarily separated who ordinarily would not meet standard age and service requirements for annuity eligibility (Appendix 21a). In short, the Civil Service Commission rewrote the statute and expanded its scope by promulgating the very regulation later utilized by the Post Office Department to cause the Petitioners to retire. Subsequently, effective January 1, 1973, the Commission, without explanation, rescinded the regulation. Thereafter, Congress amended 5 U.S.C. § 8336 (d) to incorporate in the statute voluntary resignations submitted in contemplation of a reduction in force (Appendix 22a). In the interim between the promulgation of the regulation and its rescission, Petitioners, spurred by the patent threat presented them by the Post Office Department and denied access to the kind of information which would have enabled them to weigh alternatives, chose to accept the Department's offer as the lesser harm.

The Post Office Department, for its part, did not even bother to adhere to the requirements of the subchapter in implementing the retirement proposal. Ac-

cording to the subchapter, competitive areas were required to be designated when resignations were requested in anticipation of a reduction in force. Each employee whose resignation was requested had to be "fully informed of his retention rights under the reduction-in-force regulations". In fact, however, competitive areas were not established and retention registers were not prepared—and both, under 5 C.F.R. § 351.402 to 404, are mandatory when reductions in force are instituted by federal agencies—until after the retirement offer had expired.

What on the surface appeared to be a proposal benefiting eligible employees was, in fact, a means of coercing retirement of civil servants who were never given the opportunity to weigh the risks with which they were confronted. The statute was flouted. The vaunted protection afforded federal employees was demonstrated more in the omission than in the observance. The issue has a broader implication than its effect on the relatively small class of postal employees who were coerced into resignation in May and June of 1971. The mode of its disposition by the Court below poses a threat to the employment security of all federal employees. Executive reorganizations and reductions in the work force employed by federal agencies are inevitable from time to time. The Civil Service Commission, not less than other federal agencies, should be required to safeguard the hard-won employment protection built into the federal civil service system.

Part and parcel of the Civil Service's attitude regarding the post office reorganization was its perfunctory and superficial examination of the appeal of Petitioner Greinsky. It fully investigated neither the legality of the procedure, nor its implementation, nor its

application to Greinsky's case. Rather than examining whether coercion was involved in the retirement proposal as announced by the Postmaster General, the Board of Appeals and Review of the Commission accepted as conclusive the statement in the announcement that no coercion was intended by the action. As evidence of the voluntariness of Greinsky's retirement, the Board noted that he "voluntarily" sought information concerning his annuity eligibility. Neither of these facts proves or even tends to prove the proposition it is cited to support. Similarly, the Board attempted to buttress its decision with the unexceptionable statement that a retirement action is "voluntary" if the employee understands the transaction, has freedom of choice, is given a reasonable time to make his choice, and is permitted to set the effective date of his retirement." The implication is that these factors were present when Greinsky resigned; in fact, none was. Although he sought information concerning his annuity, he was denied access to retention registers and to information that would have enabled him to intelligently assess his chances of continued employment. Greinsky was informed that his current job would be abolished but was not informed of any other employment options which might be available to him in the reorganized Postal Service. The "freedom of choice" offered him was to resign and receive his bonus, or to stay at unknowable risk. The time within which he had to decide —18 days if he were to receive maximum benefits— was meaningless in the absence of information upon which he could have based an informed decision. By the same token, the Board's suggestion that Greinsky was permitted to set the effective date of his retirement callously turns upside down the reasons for which Greinsky chose to resign by a date certain.

Nor did the Board conduct a critical examination of the implementation of the retirement offer. Had it done so, it would have found that the Post Office Department had not complied with procedures mandated by the subchapter, including the critical requirement that employees be fully informed of their retention rights. The faulty conclusions and the failure of the Commission to fully investigate Greinsky's claims rendered the decision irrational, arbitrary and capricious. More than that, they led to the summary judgment by the District Court, the determination by the Court of Appeals that both the Board and the District Court acted properly, and the imminent risk that the rights of federal employees to reasonably secure employment will be vitiated.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE ISSUE OF WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NECESSARY WHERE SUCH EXHAUSTION WOULD BE FRUITLESS.

The Court below upheld the District Court's dismissal of the action as to all of the Petitioners except Greinsky on the ground that they failed to exhaust their administrative remedies—i.e., failed to appeal to the Post Office Department or the Civil Service Commission. This holding is in conflict with the holding of two other United States Courts of Appeals. These have held that exhaustion is not necessary in cases in which the issues common to a class or to co-plaintiffs have been finally adjudicated by an administrative body in a single case. Indeed, the cases cited by the Court below to support its position in actuality stand for the proposition that in cases in which one person has exhausted his remedies, and it would be fruitless for others to do so, all nonexhausting persons similarly situated may

be joined in a class action: *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Barela* v. *United Nuclear Corp.*, 462 F.2d 149 (10th Cir. 1972). While these are employment discrimination cases and the administrative agency involved is the Equal Employment Opportunity Commission, the principle stated in *Oatis* that "[it] would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints . . ." is necessarily equally valid for civil service cases. 398 F.2d at 498.

The Court below did attempt to distinguish the Greinsky appeal, reasoning that the issues in his case were peculiar to him, and from this that the other Petitioners had slept on their rights. In fact, however, the allegation of coercion in Greinsky's complaints to the Civil Service Commission was based on the terms of the retirement offer, the short period of time in which to make the decision whether or not to retire, and the denial of access to retention registers, all facts common to the named Petitioners and the class they seek to represent. That additional facts suggesting coercion were present in the Greinsky case is irrelevant, since his claim was rejected in its entirety.

The real basis for the Court's insistence on the obligation of all of the Petitioners to have exhausted their administrative remedies is perhaps to be found in its statement that its "obligation to insist on the exhaustion doctrine is underscored" by the magnitude of the relief sought—a "sweeping ouster and reinstatement program." According to the decision, courts "must give consideration to the public interest and inconvenience." The Court below has apparently reasoned that the public interest lies in minimizing disruption;

actually the public interest lies in ascertaining what is right, fair, and equitable. As this Court has recently noted, "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say . . . that [constitutional rights] were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972).

III. THE CLASS ACTION SHOULD HAVE BEEN CERTIFIED PURSUANT TO THE USUAL INTERPRETATION OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Court of Appeals upheld the District Court's refusal to certify the class action on the twin theories that there was a "likelihood" of "divergent views" among the class sought to be represented by the named Petitioners and an equal likelihood that the remedy sought was potentially complex. As noted above, administrative inconvenience should not, by itself, provide any basis for rejecting Petitioners' appeal. Furthermore, the emphasis upon the remedy sought in the opinion below seems premature, in that the effect of the decision is to block access to the courts, thereby foreclosing a hearing on the merits.

The purported class herein meets Rule 23's threshold requirements of impracticability of joinder, existence of common questions, typicality of claims of representative plaintiffs, and adequacy of protection of class interests (Appendix 20a). As to the possibility stressed by the Court below that there may be divergent views among the defined class, class actions normally are not rendered impermissible by the fact that the identity of

interests is not absolute or that particular questions remain to be resolved with regard to individual class members after the common questions of law and fact have been disposed of: *Esplin* v. *Hirschi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F.2d 909 (9th Cir. 1964). The one essential requirement is that the common legal and factual questions predominate over questions peculiar to individuals, and that test is met in this case. Rule 23(b)(3).

In support of its theory that a class action may not be maintained when the interests of the members in the remedy sought may differ, the Court below relies on *Dierks* v. *Thompson,* 414 F.2d 453 (1st Cir. 1969). But in that case the court expressly did not reach the question of whether or not a class action might be maintained in the instance of a class limited by definition to those who agreed with the relief sought. *Id.* at 456-57. Furthermore, the court upheld the propriety of the class action for the reason that, while the representative plaintiffs were determined not to fairly represent all members of the specified class of employees, it nevertheless remained true that "any whom they do not represent are represented by defendants." *Id.* at 457. Similarly, in this action, any members of the class sought to be represented who would prefer continued retirement to reinstatement may be said to be represented by the defendants (respondents). Furthermore, the Court may allow redelineation of the class as appropriate under Rule 23 (c) (4), and prospective class members may "opt out," under Rule 23 (c) (2), from any relief subsequently granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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August 7, 1974

OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1013

ROBERT E. PHILLIPS, Individually and on Behalf of Each and All Others Similarly Situated, ET AL., *Appellants*

v.

E. T. KLASSEN, Individually and in His Official Capacity as Postmaster General of the United States Postal Service, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided May 10, 1974

William R. Duff, with whom *Ivan Frank Kardos* were on the brief, for appellants.

Eugene B. Granof, Attorney United States Postal Service, of the bar of the United States District Court for the District of Columbia, *pro hac vice* by special leave of court, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry, Derek I. Meier* and *N. Richard Janis*, Assistant United States Attorneys, were on the brief, for appellees. *Earl J. Silbert*, United States Attorney and *Gregory C. Brady*, Assistant United States Attorney also entered appearances for appellees.

Before LEVENTHAL, MACKINNON and WILKEY, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* Appellants are former employees of the United States Post Office Department, reorganized in July, 1971, as the United States Postal Service. They accepted offers to resign with retirement benefits and an additional bonus equal to six months pay rather than

face the prospect of separation from the Department as part of a reduction in force attendant to the reorganization of the agency. Suing for themselves and on behalf of those similarly situated,[1] they brought an action in District Court seeking a declaration that their retirements were void; they also sought reinstatement with back pay, alleging that under the circumstances their resignations were coerced as a matter of law. The District Court denied plaintiffs' motion for certification as a class action and dismissed the action against all but one of the named plaintiffs, against whom it granted defendants' motion for summary judgment. We affirm.

I. The Early Retirement Offer

On August 12, 1970, Congress passed the Postal Reorganization Act in an effort to upgrade the nation's postal service. The Act replaced the Post Office Department with the United States Postal Service, an "independent establishment of the executive branch of the Government of the United States. . . ." 39 U.S.C. § 201.

The Act was a congressional mandate for reconstruction of the Department and reform of its operations. As part of its task, the new Postal Service sought to streamline its operations and eliminate nonessential departments and personnel. On January 18, 1971, the Acting Assistant Postmaster General, Bureau of Personnel, put the postal staff on notice, in a Memo To All Headquarters Employees,

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[1] Named as representative plaintiffs were five individuals, each representing an age and years-of-service category eligible for the early retirement offer. Robert R. Phillips represented the 55 years old/30 years of service category; Mary A. Karwoski represented the 60 years old/20 years of service category; Ira Greinsky represented the 25 years of service category; Ann Putney Flory represented the 50 years old/20 years of service category; and Birger F. Burman represented the 62 years old/5 years of service category. (JA 1-5).

that personnel changes would attend the advent of the new Postal Service, "and those changes may vary from personnel transfers to reduction in grade to job abolishments, or reduction in force." (JA 14). This announcement was followed by several months of rumors of large-scale reorganization and a reduction in force, but no further hard information was forthcoming until the middle of May.

On May 12, 1971, the Postmaster General, in a Memorandum To Headquarters and Regional Employees (JA 17), announced the reorganization of the Headquarters and Regional management structure of the Postal Service. Postal regions were reduced from fifteen to five, and authority was decentralized. Anticipating major personnel changes, the Postmaster General announced a liberalization of retirement policies coupled with an offer of a bonus equal to six months' salary to those employees who resigned between May 16 and June 15. Additional details were supplied by another Memorandum, issued by the Postmaster General the following day. (JA 20).

Normally, a federal employee is entitled to retire with an annuity only if 55 years of age with 30 years of service, or 60 years of age with 20 years of service, or 62 years of age with five years of service. 5 U.S.C. § 8336. Section 8336(d) also provides, however, that:

> An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

For a number of years, the Civil Service Commission interpreted the statute to mean that resignations submitted upon request in contemplation of a reduction in force constituted "involuntary" resignations, within the scope of § 8336(d). This view was for some time applied with

relative informality,[2] but for the three year period between December 10, 1969 and December 8, 1972, this construction of the law was set forth in a published ruling.[3] The Commission stated that the purpose of the interpretation was "to lighten the impact of current and future reductions in force." (JA 29) (emphasis omitted). This came about by virtue of the fact that some annuity, albeit less than that given those retiring after full service, was made available to those who resigned in contemplation of a reduction in force. However, the Commission emphasized that "this procedure is not to be used as a device for coercing employees to give up their retention rights" and outlined certain procedural safeguards.

In his Memorandum To Headquarters and Regional Employees, issued May 13, 1971, the Postmaster General invoked the procedures authorized by FPM Letter No. 831-23 (*supra*, note 3), and requested "any eligible employee who may desire to retire to submit his resignation in response to this letter." (JA 105a). In addition, employees who resigned were to receive a bonus equal to six months' pay, payable on January 1, 1972. These benefits were available only for those employees who retired between May 16 and June 15, 1971.[4] Employees retiring thereafter, or those who were separated as part of a reduction in force, would not receive annuities or bonuses. The Postmaster Gen-

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[2] Before 1969, the "resignation requested" procedure had on occasion been employed, "usually in cases of high-level policy-making positions following a change of administration." FPM Letter No. 831-23, December 10, 1969. (JA 29).

[3] Federal Personnel Manual Letter No. 831-23. This was later codified as Federal Personnel Manual Supplement 831-1, Subchapter S11-(d)(2). It was rescinded by the Commission as of January 1, 1973, by FPM Letter No. 831-32. (JA 223a).

[4] The Postal Service bonus offer was in addition to the 4.5 percent cost-of-living increase approved by the Civil Service Commission for all civil service employees who retired before May 31, 1971. To get both, postal employees had to retire before May 31.

eral's Memorandum stated that "this letter is not intended to coerce eligible employees to resign and forfeit their retention rights, but is simply an extension of the normal retirement opportunities available to employees." (JA 105b).

By June 15, 1971, 1,884 of the 2,740 postal employees eligible for the bonus and for retirement under the liberalized requirements had retired. Included in this group were the five named plaintiffs in this action. Of the five, only appellant Ira S. Greinsky sought administrative review of the action of the Post Office Department before bringing this action. On June 9, 1971, ten days after his retirement, Mr. Greinsky wrote to the New York Regional Office of the Civil Service Commission complaining that he was coerced into retiring. To support his claim, Greinsky relied not only on the alleged impropriety of the retirement scheme of the Post Office Department, but also on representations made to him by his superiors that his job was to be abolished. (JA 49).

By letter of June 29, 1971, the Appeals Examiner rejected Greinsky's complaint. Greinsky appealed this decision to the Civil Service Commission's Board of Appeals and Review, repeating his earlier allegations and adding contentions of deception and vindictiveness on the part of his superiors. (JA 54-55). This Board's decision of October 18, 1971, denied relief to Greinsky. (JA 31-34).

II. The Class Action

Plaintiffs allege that they represent a class "composed of more than 1,500 former employees of the United States Post Office Department who were coerced into premature retirement . . ." This definition of the class presupposes a favorable ruling on the very issue raised by the complaint: were the 1,884 postal employees who retired pursuant to these offers invalidly "coerced"?

It is axiomatic that in order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit and as contemporary as the requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure that "the representative parties will fairly and adequately protect the interests of the class."

In the words of Justice Stone, well known as a student and teacher of Equity: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. * * * In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

Class members whose interests are antagonistic in fact to, or even "potentially conflicting" with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process, to an adjudication taken in their name. Hansberry v. Lee, *supra*. Where courts discern that the interests of the named plaintiffs are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action.[5]

A more difficult question is raised when defendant's action is one that may be characterized as injurious by only part of the affected group. In such a situation, the question arises whether the parties to the action in fact

[5] See, *e.g.*, Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

represent the interests of those affected. In Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969), plaintiff employees brought suit to contest management's construction of the terms of a pension plan that was amenable to at least three different interpretations. The opinion by Judge Aldrich for the court noted (p. 456):

> In order to maintain a class suit plaintiffs must be truly representational [citing Carroll v. American Federation of Musicians, 2 Cir. 1967, 372 F.2d 155, at 162, vacated and remanded on other grounds, 391 U.S. 99.] * * * Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.
>
> In the case at bar, while the suing plaintiffs may have been of the opinion that wise management or other factors would cause the fund to grow, others could well have thought that a vested obligation in a fixed amount would be more desirable than to incur investment risks. Under such circumstances the court could not have found that plaintiffs were "typical" of the former Amerotron employees whom they purported to represent; they were typical of only one of two conflicting groups. Under the Rule, and as a matter of due process, plaintiffs could not represent both groups.[6]

In the case before us, challenged action of the Post Office Department was probably received quite differently by different employees. Nearly two thousand postal workers resigned. In all likelihood, some were employees who un-

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[6] See also City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *affirmed*, 467 F.2d 1262 (7th Cir. 1972); Ward v. Luttrell, 292 F. Supp. 162 (E.D.La. 1968). *Cf.* Koen v. Long, 302 F. Supp. 1383 (E.D.Mo. 1969), *affirmed*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

derstood full well that they were to be separated due to the impending reduction in force, and were affirmatively pleased to have the opportunity to resign with retirement benefits and a substantial bonus, pleased that in conjunction with the reorganization Postmaster General Blount had, in his words, "liberalized the retirement policy for Headquarters and Regional employees." There may have been others who did not know for a fact how they would be affected by the reduction in force, but were sufficiently aware of their relative seniority and their evaluation by their superiors to make a relatively informed estimate. To them as well, the offer was probably perceived as an enlightened and humane way for the Department to trim its employment rolls. Doubtless there are a substantial number who perceived the situation in the same way as the plaintiffs in this action: the effect of the reduction in force was unknown, and the benefits offered were too sweet to turn away on a gamble of retention.

If plaintiffs are successful, all of these employees, in each of these categories, will be governed by a ruling that all the resignations, the extension of annuities, and the payment of the bonuses, all are and always were unlawful. Although the complaint is not without ambiguity, a fair reading is that plaintiffs intend this to be a class action in behalf of all former Post Office employees who retired between May 16, 1971 and June 15, 1971,[7] in response to

[7] The allegations of the complaint recite that plaintiffs bring the action in behalf of all employees who "were removed from the Department between May 16, 1971 and June 15, 1971, inclusive, and who would not otherwise have been removed or voluntarily retired between those dates." (Par. 3, 5, 7, 9, 11). The allegation to support a class action recites that the members of the various sub-classes (*supra*, note 1) comprise over 1,500 former Post Office employees, and the motion for certification of a class action begins with the allegation that plaintiffs, constituting over 1,500 former Post Office Department employees, are so numerous that joinder of all members of the class is impracticable.

the suggestion of the Postmaster General. When, as here, there is complaint as to injury from an allegedly invalid action of a Government official and the action may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual, the foundations of maintenance of a class action are undermined. In view of the likelihood that there will be divergent views among the employees who pursued the voluntary retirement route, as to whether they have been injured or benefited we cannot say the District Court erred in concluding that plaintiffs cannot fairly maintain the action they have brought in behalf of the more than 1,500 former employees.[8]

The problems we have identified cannot be avoided merely by saying that it is always open to members of a class to "opt out" of any relief to which they are held entitled. One point is that some members of the class may not be entitled to the same relief as others in any event. Can reinstatement be ordered as to employees who are now disabled—perhaps due to conditions arising in other employment? Moreover, as to some employees who took advantage of the retirement offer, questions of estoppel might arise. Without deciding these questions, we point out the dangers of their being buried in the catch-all of the class action. Perhaps even more important is the possibility

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[8] Compare Hansberry v. Lee, *supra*, 311 U.S. at 44:

> [It] is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. * * *
>
> Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class.

that the theory now proferred in the class action would expose some members of the retired class to a legal liability, to return the bonus, they are not in a factual position to shoulder.

The issue of defining the class, and its proper representation, may arise in some measure in all class actions, but it is not likely to cut as keenly when only future relief is sought, for even an action by one person, or a smaller class, may result in a judgment that has the same impact on the future as a declaratory judgment in a class action. But here there is the added difficulty that the action is one that would trigger affirmative relief, with both monetary consequences and an unscrambling of employment rolls.

Plaintiffs seek certification of their class under Rule 23 (b)(3) of the Federal Rules of Procedure, which requires that the court must conclude that proceeding as a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." In our view, there are strong considerations why that finding was not made, either in support of the "class" as designated by plaintiffs, or in support of a judicial redefinition of the class in terms of subclasses, *see* Rule 23(c). The instant action asks the court to invalidate steps taken as part of a massive reconstitution of the nation's postal services. The problem of relief would be formidable if rights were proclaimed on a "class" basis, especially if reinstatement were a legal right, as claimed.[9] Corollary to reinstatement would be the problem of defining the rights of current employees of the Postal Service.

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[9] The problems of individual reinstatement were recently noted by the Supreme Court in Sampson v. Murray, 42 U.S.L.W. 4221, 4225 (U.S. February 19, 1974). If reinstatement of the individual carries with it "attendant tension," reinstatement of hundreds carries the potential of tension multiplied to electrifying proportions.

III. Exhaustion of Administrative Remedies

The foregoing comments provide a context for our ruling that the lawsuit must not only fail as a class action but also, whether viewed as a class action or individual actions, must fail for another reason—the failure to exhaust administrative remedies.

There was no appeal to the Civil Service Commission by any member of the plaintiffs' alleged class except by Greinsky, and his appeal, as we shall see, was grounded not on the injury now alleged as to all members of the class, that the general presentations of the Postmaster General were, in effect, coercive per se, but rather in the claim that Greinsky was coerced by the particular representations made to him.

It is a basic principle of judicial review of administrative determinations that the courts are open only to those who have exhausted available administrative remedies. Numerous decisions of the Supreme Court [10] and of this court [11] so hold. The vitality of the rule is underscored by its recent application by the Supreme Court in Sampson v. Murray, 42 U.S.L.W. 4221 (U.S. February 19, 1974), to a suit by a government employee, protesting an allegedly invalid discharge, who was willing to pursue her appeal to the Civil Service Commission but sought temporary judicial maintenance of the status quo while that remedy was exhausted. The requirement of recourse in the first instance to the administrative processes of the Civil Service Commission is fully applicable to cases in which government employees allege that seemingly voluntary resigna-

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[10] See, *e.g.*, F.C.C. v. Schreiber, 381 U.S. 279, 296-97 (1969); Reisman v. Caplin, 375 U.S. 440 (1963); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[11] See, *e.g.*, Brawner Bldg., Inc. v. Shehyn, 143 U.S.App.D.C. 125, 442 F.2d 847 (1971); Spanish Int'l Broadcasting Co. v. FCC, 128 U.S.App.D.C. 93, 102-04, 385 F.2d 615, 624-26 (1967); Neisloss v. Bush, 110 U.S.App.D.C. 396, 401, 293 F.2d 873, 878 (1961).

tions were in fact coerced, Dabney v. Freeman, 123 U.S. App. D.C. 166, 358 F.2d 533 (1965).

The doctrine requiring exhaustion of administrative remedies applies to class actions as well as individual actions. While there appears to be some divergence in the opinions as to the circumstances under which exhaustion by one member is sufficient to meet the exhaustion condition for the class action,[12] it is generally agreed that exhaustion by at least one member of the class is a necessary prerequisite for a class action.[13] Where not even one member of the class has either pursued an administrative remedy or shown why one of the exceptions to the exhaustion rule is applicable, there is a barrier, absent unusual circumstances, to the class action.

In the case at bar, the court's obligation to insist on the exhaustion doctrine is underscored by plaintiffs' effort to upset administrative actions on a broad basis and to embroil the courts in a sweeping ouster and reinstatement program. Plaintiffs' course would deprive the courts of the benefit of the guidance and mechanisms of the Civil Service Commission. If the position advanced by plaintiffs is sound, its timely presentation to the Civil Service Commission might have generated corrective relief that would have avoided hardships that would be attendant upon a court decree at this date. The courts of equity, where class

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[12] *Compare* Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Co., 304 F. Supp. 1284 (N.D. Indiana 1969) (exhaustion not prerequisite to grant of affirmative relief where one member of class has exhausted his remedies) *with* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D.Ind. 1967) (only prohibitory injunction or declaratory judgment available for members of class who have not exhausted administrative remedies despite exhaustion by named plaintiff).

[13] See, *e.g.*, Barela v. United Nuclear Corporation, 462 F.2d 149 (10th Cir. 1972); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

actions are brought, must give consideration to the public interest and inconvenience in determining whether relief should be extended beyond or left short of the relief that would be available in a purely private action. Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937). Moreover, timely appeals to the Civil Service Commission might well have brought to the fore the various subclasses, whose indeterminate nature pulls away from maintenance of the present action on a class basis, and have identified differences in interest, in legal positions, and in available relief, all of which could have been considered by the court in a final ruling on the class suit issues.

Appellants rely on the exception that exhaustion is not required when it is certain that established administrative procedures would prove unavailing.[14] Greinsky's appeal, it is argued, was a signal that the Civil Service Commission would not grant relief for resignations taken in response to the Postmaster General's memos of May 12 and 13, for it established the Commission's view that the general representations by the Postmaster General were not coercive as a matter of law. As we have already noted, however, Griensky's appeal was not grounded on the alleged coercion of the general representations made at the highest levels of the Post Office, but was focused on the coercive impact of the particular representation made to

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[14] In Allison v. United States, 451 F.2d 1035 (Ct.Cl. 1971), relied on by plaintiffs, some of the 15 plaintiffs had sought administrative action. The Civil Service Commission, taking the complaints together, ruled that no relief was available as a matter of law. In contrast, Greinsky's appeal was taken by him alone, and its resolution did not purport to decide the question of the coerciveness of the Postmaster's early retirement offer as a matter of law.

Appellants also rely on Farrell v. Gardner, 279 F. Supp. 427 (E.D.Pa. 1968); but in that case the court held that plaintiff was unaware of the existence of administrative remedies and further found that those remedies clearly would have been unavailing. Neither condition obtains in the present case.

him by his immediate superiors, who had allegedly colluded to insure its coercive effect.[15] Moreover, at no time did Griensky assert that the offer of the Postmaster General was without statutory authority. Since the issue was not before the Commission, its ruling could not in any sense be taken as a considered holding on the contention presented in the complaint.

Taking the complaint as filed by appellants Phillips, Karwoski, Flory and Burman as individuals, and passing by the class action allegations, these claims must likewise be dismissed for failure to exhaust administrative remedies. We add to what has already been said that these individuals might have obtained relief from the Commission even assuming it was or would have been of the view that the early retirement option was not of itself coercive, for this would not have precluded the Commission from finding that it did serve to coerce employees of modest experience, responsibility and sophistication.

IV. Greinsky's Claim

To the extent that Greinsky's claim as an individual reflects a recourse to administrative remedies, summary judgment for dismissing his claim with prejudice was appropriate.

Greinsky makes no allegation that he did not fully understand the terms of the Post Office's offer to extend retire-

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[15] In Greinsky's affidavit in support of plaintiffs' motion for summary judgment (JA 181), Greinsky described the pressure to resign this way:

> When I retired in May, 1971 my decision to do so was not freely made but rather made because I had no other real alternative. I had to take the bonus and retire because at least then I would have provided some security for my family, whereas, had I remained and been R.I.F.ed, *as I was assured would happen,* I would have lost the bonus. (emphasis added.)

ment benefits to those who resigned voluntarily. He signed a statement on May 31, 1971, that he had "acceded to the Postmaster General's request and have of my own volition foregone any retention rights under reduction in force regulations." (JA 107). He was an employee who had both long tenure, 27 years of service, and a position of responsibility.[16] The sole evidence in the record that the resignation was not voluntary is Greinsky's after-the-fact assertion to that effect.

The issue for the court is whether there is "evidence of substance in that record which supports the [Civil Service] Commission's view of the matter." Dabney v. Freeman, *supra*, 123 U.S. App. D.C. at 168, 358 F.2d at 535. The Commission's finding that Greinsky's resignation was not coerced by particular representations made to him is supported by substantial evidence.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-72

ROBERT R. PHILLIPS, et al., *Plaintiffs*,

v.

E. T. KLASSEN, et al., *Defendants*.

ORDER

Upon consideration of defendants' motion to dismiss or for summary judgment, the memorandum of points and authorities and exhibits filed in support thereof, and of the entire record herein, it is by the Court this 6th day of October, 1972,

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[16] At the time of his resignation, Greinsky was Manager of the Training Section of the New York Regional Office.

ORDERED that plaintiffs' motion for certification of class action is denied; and it is further

ORDERED that this action be and it hereby is dismissed with respect to plaintiffs Phillips, Flory, Karwoski, and Burman; and it is further

ORDERED that with respect to plaintiff Greinsky, defendants' motion for summary judgment be and it hereby is granted.

/s/ J. H. PRATT
United States District Judge

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D. C. 20415

DECISION

IN THE MATTER OF IRA S. GREINSKY

TYPE CASE: *Alleged Adverse Action (Resignation)*

INTRODUCTION

Mr. Ira S. Greinsky submitted an appeal to the Board of Appeals and Review from a decision issued on June 29, 1971, by the Civil Service Commission's New York Regional Office, which found that Mr. Greinsky's separation from the New York Regional Office of the Post Office Department was a voluntary act of resignation and that his appeal therefrom was unacceptable for adjudication.

STATEMENT OF THE CASE

Mr. Greinsky was employed in the position of Manager, Training Section, PFS-Level 16, with the New York Regional Office of the Post Office Department. He resigned his position, effective May 31, 1971. By letter of June 8, 1971, to the Commission's New York Regional Office he expressed a desire to appeal a reduction in force action

which resulted in his involuntary retirement from the Postal Service. He alleged that he was coerced into retiring, that the prepared statement that he was given to sign was not of his own volition; that he was never given complete information as to his retention rights under the reduction-in-force regulations; and that he was not given sufficient notice. In a subsequent letter to the Commission's New York Region he stated that on April 26, 1971, he was advised by the Deputy Regional Director (Services) and the Regional Director of the Postal Service on two separate occasions that his position was being abolished; that on May 12, 1971, he and other employees of the Postal Service, New York Regional Office, were advised of the impending reorganization, and that artificial time limits were set which forced employees to make decisions without being advised as to the alternatives.

Additional argument and representations advanced by Mr. Greinsky in his letter of appeal to the Board are generally the same as those presented to the Region. To further support his claim of coercion and deception he called attention to his appeal to the Assistant Postmaster General from a decision issued on July 21, 1970, by the New York Regional Director of the Postal Service to demote him from the position of Manager, Training Section, PFS-16, to a position at level PFS-15. He stated that in spite of the Regional Director's promise to withhold action pending his appeal with the Assistant Postmaster General, he was removed from his position and assigned other duties, and even after the Assistant Postmaster General found the charges not sustained he (Mr. Greinsky) was told he could not assume his position because his job was going to be abolished and there was no place for him. He maintained that he was deceived and coerced into retiring by being deprived of his normal position, by being given false information; by the use of incorrect procedures in preparation of the retention register, and by withholding information favorable to his prospects.

ANALYSIS AND FINDING

The Board of Appeals and Review has fully considered the case record which shows that the circumstances which led to Mr. Greinsky's separation on May 31, 1971, do not establish, in the judgment of the Board, that force, duress, deception or any other form of improper action was employed by the agency to obtain his resignation. The facts establish that on May 13, 1971, the Postmaster General conducted a national teleconference at which time he outlined the liberalization of the retirement policy to minimize the personnel impact of reduction in force in the Post Office Department as a result of the impending reorganization. All management employees, including Mr. Greinsky, were in attendance. Subsequent to the conference, Mr. Greinsky and other employees were furnished a copy of the Postmaster General's memorandum of May 13, 1971, to Headquarters and Regional Employees, which requested eligible employees who may desire to retire to submit their resignation in response to the letter. The memorandum specifically stated that the letter was not intended to coerce eligible employees to resign and forfeit their retention rights but was simply an extension of the normal retirement opportunities available to employees. Employees were also furnished a memorandum on retirement eligibility requirements, an employee resignation form, and a list of questions and answers.

Contrary to Mr. Greinsky's claim that he was coerced into submitting his resignation, the record indicates that subsequent to the meeting, Mr. Greinsky voluntarily sought information from the Personnel Services Section relative to his annuity and that shortly thereafter he completed and submitted his resignation form to become effective May 31, 1971. The record also indicates that Mr. Greinsky applied for and was granted annual leave from May 21 through May 28, 1971. The general principle is that an action is voluntary if the employee understands the transaction, has

freedom of choice, is given a reasonable time to make his choice, and is permitted to set the effective date.

The previous decision of the Director of the New York Regional Postal Service to demote Mr. Greinsky on a charge of failure to properly supervise, and Mr. Greinsky's subsequent appeal therefrom, have no particular bearing on the voluntariness of his resignation. He states that although the Department's decision in the matter was in his favor he was not permitted to assume the duties of his normal position. He also states that in April 1971, he was advised that his position would be abolished. In either instance, he had an opportunity to choose between alternatives. While the alternative may have been unpleasant to Mr. Greinsky, the Board finds no substantial showing that the alternative he chose—resignation—was forced upon him through deceit or otherwise. Since a voluntary separation is not subject to appellate review by the Civil Service Commission, the Board finds that further consideration of Mr. Greinsky's case is not warranted.

DECISION

The decision of the Commission's New York Region, issued June 29, 1971, is hereby affirmed.

The Commission's regulations provide that the decision of the Board is final and there is no further right of appeal.

For the Commissioners:

/s/ WILLIAM P. BERZAK
Chairman

October 18, 1971

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

. . . .

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

. . . .

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

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5 U.S.C. § 8336 (1970)

§ 8336. *Immediate retirement*

(a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.

(b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity.

. . . .

(d) An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

(e) An employee who is separated from the service after becoming 62 years of age and completing 5 years of service is entitled to an annuity.

5 U.S.C. § 8336 (as amended, 1973)

§ 8336. *Immediate retirement*

. . . .

(d) An employee who is separated from the service—

(1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) voluntarily, during a period when the agency in which he is employed is undergoing a major reduction in force, as determined by the Commission, and who is serving in such geographic areas as may be designated by the Commission;

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

Federal Personnel Manual Supplement 831-1 (1970)
Subchapter S11. Discontinued Service Retirement

. . . .

d. *Resignation requested*

. . . .

(2) After an agency determines that a reduction in force is necessary, it may, before resorting to the prescribed reduction-in-force procedures or while these procedures are in process, request by letter the resignation of employees in the affected competitive area who meet the age or service requirements, or both, for discontinued service retirement. Separation resulting from a resignation submitted in response to such a request will be considered involuntary for retirement purposes. The purpose of this procedure is to lighten the impact of the reduction in force (i.e., an employee may decide to forego his retention rights and resign, thus enabling the agency to retain an employee who would otherwise be separated). To avoid any implication of coercion, an employee must be fully informed of his retention rights under the reduction-in-force regulations. His

written resignation must specifically state that he is resigning of his own volition at the request of a particular responsible official due to a reduction-in-force situation, and that he was not coerced to forego his retention rights. A copy of each resignation in this category must accompany the retirement application. The individual Retirement Record (Standard Form 2806) in such a case should record the separation as "Resignation—RIF Situation."

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5 C.F.R. Chapter 1—Civil Service Commission (1973)
Part 351—Reduction in Force

. . . .

SUBPART D—SCOPE OF COMPETITION

§ 351.401 *Determining retention standing.*

Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§ 351.402 *Competitive area.*

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

. . . .

§ 351.403 *Competitive level.*

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike

in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by the Commission.

. . . .

§ 351.404 *Retention register.*

(a) Each agency shall establish a separate retention register from the current retention records of employees in, and employees temporarily promoted from, each competitive level affected when a competing employee is to be released from a competitive level under this part.

(b) The agency shall enter on the retention register in the order of his retention standing the name of each competing employee in, and each competing employee temporarily promoted from, a competitive level (whether in duty, leave, or furlough status), except an employee on military duty with a restoration right.

(c) The agency shall enter on a list apart from the retention register the name and expiration date of the appointment or promotion of each employee serving in a position in the competitive level under specifically limited temporary appointment or temporary promotion followed by the name of each employee serving in a position in the competitive level with a performance rating of less than "Satisfactory".

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-88

ROBERT R. PHILLIPS, ET AL., PETITIONERS

v.

E. T. KLASSEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 10, 1974. The petition for a writ of certiorari was filed on August 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the offer of temporarily liberalized retirement provisions and a special bonus to employees retiring within a limited period had the effect of illegally

coercing petitioner Greinsky into resigning from the Post Office Department.

2. Whether individuals challenging such resignations must exhaust their administrative remedies.

3. Whether the named petitioners are sufficiently typical of all employees who resigned to take advantage of temporarily liberalized retirement provisions and a special bonus to represent them as a class.

STATEMENT

This case involves the retirement of approximately two thousand Post Office Department headquarters and regional employees in 1971 as the transformation of the Post Office Department into the U.S. Postal Service was taking place. On January 18, 1971, headquarters employees were notified that the advent of the new Postal Service would result in personnel changes varying from "personnel transfers to reduction in grade to job abolishments, or reduction in force" (Pet. App. 2a-3a). On May 12, 1971, in two memoranda to headquarters and regional employees, the Postmaster General described a streamlined reorganization involving the merger of fifteen regions into five, and, in anticipation of major personnel changes, offered a bonus equal to six months' salary to those employees who resigned between May 16 and June 15, and announced a liberalization of retirement policies.

Normally, a federal employee is entitled to retire with an annuity only if he is 55 years of age with 30 years of service, or 60 years of age with 20 years of service, or 62 years of age with five years of service. 5 U.S.C. 8336. However, reduced annuities are available in cases of involuntary separation, except for cause, of employees who are 50 years of age with 20 years of service or who have completed 25 years of service. 5 U.S.C. 8336(d). The Postmaster General invoked a published rule (later en-

acted by Congress, P.L. 93-39, 87 Stat. 73) to permit those who resigned in response to his letter to have their resignations treated as involuntary for purposes of age and service requirements. The Postmaster General stressed that "this letter is not intended to coerce eligible employees to resign and forfeit their retention rights, but is simply an extension of the normal retirement opportunities available to employees" (Pet. App. 5a). By June 15, 1971, 1,884 of the 2,740 postal employees eligible for the bonus and for retirement under the liberalized requirements had retired.

The five named petitioners, each representing a different age and service classification, filed suit on June 14, 1972, on behalf of themselves and all others similarly situated, charging that they had been unlawfully removed from their positions and that their retirements were coerced as a matter of law. Only petitioner Greinsky, however, exhausted his administrative remedies. The district court denied certification of a class action, granted summary judgment against Greinsky, and dismissed the action with regard to the other named plaintiffs (Pet. App. 15a-16a).

The Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. 1a-15a). The court of appeals held that a class action was not proper, and that the individual plaintiffs except for Greinsky had failed to exhaust their administrative remedies. With respect to Greinsky's claim, the court of appeals, noting that prior to his resignation he had signed a statement that he had voluntarily foregone his retention rights, found no evidence that Greinsky's resignation was involuntary except his "after-the-fact assertion to that effect" (Pet. App. 15a).

ARGUMENT

1. Petitioner Greinsky asserts that he was illegally coerced into resigning, and that the resignation was unauthorized (Pet. 9-10). In rejecting the coercion claim, the Civil Service Commission noted, (1) Mr. Greinsky attended a teleconference at which the Postmaster General outlined the liberalization of the retirement policy, (2) he was furnished memoranda and fact sheets explaining the policy, (3) he subsequently sought information from the Personnel Services Section relative to his annuity, and (4) he took a week of annual leave prior to the effective date of his resignation (Pet. App. 18a). Further, he signed a statement that he had "acceded to the Postmaster General's request and have of my own volition foregone any retention rights under reduction in force regulations" (Pet. App. 15a). In these circumstances the courts below properly found the resignation to be voluntary.

Petitioner Greinsky's contention that his resignation was contrary to applicable regulations is unsound. His reliance on the particular requirements of the regulations for reductions in force, 5 C.F.R. 351.402 to 351.404 (Pet. App. 23a-24a) is misplaced because these regulations apply to actual reductions in force and not to resignations in anticipation of such reductions.[1]

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[1] 5 C.F.R. 351.201(a) provides:

> Each agency shall follow this part when it releases a competing employee from his competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

Petitioners further assert (Pet. 8) that the Civil Service Commission "rewrote the statute" in allowing resignations submitted upon request in contemplation of a reduction in force to be considered "involuntary" for the purpose of accruing annuities under 5 U.S.C. 8336(d).[2] However, the Civil Service Commission could reasonably interpret a resignation in contemplation of a reduction in force as "involuntary" separation and, indeed, the Commission's interpretation was ratified by Congress. See P.L. 93-39, 87 Stat. 73.

2. Petitioners' second contention that petitioners other than Greinsky should not have been required to exhaust their administrative remedies is invalid. The court of appeals held that exhaustion was required because petitioners sought to "upset administrative actions on a broad basis and to embroil the courts in a sweeping ouster and reinstatement program" without the benefit of the "guidance and mechanisms of the Civil Service Commission" (Pet. App. 12a). The court of appeals' insistence on the exhaustion requirement is consistent with this Court's decisions, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 296-297, and the requirement was particularly applicable here where resort to the Civil Service Commission might have "generated corrective relief that would have

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[2]In 1971, 5 U.S.C. 8336(d) provided:

> An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

avoided hardships that would be attendant upon a court decree * * * " (Pet. App. 12a).[3]

3. Petitioners' third contention is that the class action should have been certified. Petitioners implicitly concede that the claims of the named petitioners are not typical of all those who retired to obtain the special bonus, but they assert that any members of the asserted class who would prefer continued retirement to reinstatement may be said to be represented by the defendants (respondents) (Pet. 14) under the rule of *Dierks* v. *Thompson*, 414 F. 2d 453 (C.A. 1). *Dierks,* however, is inapplicable to this case. In *Dierks* the plaintiffs sought the establishment of a trust fund rather than individual cash claims, and the sole issue presented concerned the proper construction of a corporate pension plan. In contrast to *Dierks* which involved only two conflicting groups, in this case there are not simply those who want to be reinstated and those who do not. Those covered by the class asserted by petitioners are in various age and service categories, were to varying degrees likely to be retained in the event of a reduction in force, and were doubtless to varying degrees aware of that likelihood. Thus the court of appeals was correct in concluding that the petitioners did not fairly represent the

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[3]Contrary to petitioners' contention (Pet. 7), the court of appeals decision is not in conflict with *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (C.A. 5) and its progeny, *e.g., Barela* v. *United Nuclear Corp.*, 462 F. 2d 149 (C.A. 10). While those cases permitted the maintenance of a class action where only one of the named plaintiffs had exhausted administrative remedies, the claims involved were Civil Rights Act employment discrimination claims and, as the court of appeals in *Oatis* noted, racial discrimination is by definition class discrimination. Whatever application the principles of these decisions may have where the members of the class can be identified by an easily applied objective criterion, they are inapposite here where claims of coercion necessarily involve a particularized inquiry as to each member of the alleged class.

interests of the class of more than 1,500 employees.[4] See *Hansberry* v. *Lee*, 311 U.S. 32, 41-44.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4]The court of appeals also noted the danger that "the theory now proferred in the class action would expose some members of the retired class to a legal liability, to return the bonus, they are not in a factual position to shoulder" (Pet. App. 10a).

DOJ-1974-10